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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2209 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SALIM HANIFBHAI SHEIKH

Versus

STATE OF GUJARAT

Appearance:

MR HR PRAJAPATI for Petitioner No. 1

MR MR PRAJAPATI for Petitioner No. 1

Ms.Archana Raval, Assistant GOVERNMENT PLEADER, for the Respondents.

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 27/07/2004

ORAL JUDGEMENT

By filing this petition, the petitioner-detenu has challenged his detention order dated 24.1.2004. By

the impugned order, the petitioner is detained as a 'bootlegger' under the provisions of the Gujarat Prevention of Anti-social Activities Act, 1985 ("PASA", for short). Along with the order of detention, the petitioner is also served with the grounds of detention.

In the grounds of detention, there is a reference about two registered cases against the petitioner. Both these cases are filed under the Bombay Prohibition Act. It is alleged that the petitioner is dealing in foreign liquor.

The Authority, after considering the said cases and after recording the statements of witnesses, whose names have not been disclosed to the petitioner, detained him under PASA. The said order of detention is impugned in this petition.

The learned Advocate for the petitioner, submitted that the authority has committed an error in passing the detention order against the petitioner, because the two registered cases, wherein it is alleged that the petitioner is dealing in foreign liquor, can, at the most, be said to be in breach of law and order, but it cannot be said that the petitioner has committed breach of public order by committing the said offences. It is submitted that the names of the witnesses have been wrongly withheld by claiming privilege under Section 9(2) of PASA. Before claiming the privilege under Section 9(2) of PASA, the Authority has not tried to find out the antecedents and credentials of the detenu. The learned Advocate for the petitioner, therefore, submitted that the subjective satisfaction was not properly recorded by the authority in connection with not disclosing the names of witnesses by exercising powers under Section 9(2) of PASA. To substantiate this point, Mr.Prajapati relied on the decision of this Court in Kishor Naginbhai Parmar v. State of Gujarat & Ors., 2000 (4) GLR 3236, wherein this Court (Coram : A.L. Dave, J.) held as under :-

> " ... ...
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> 14. In this view of the matter, the order of the detaining authority and the grounds of detention do not indicate the basis of arriving at the subjective satisfaction. A mere statement about having verified the veracity, genuineness and correctness of the fear expressed by the witnesses, under such circumstances, can be of no virtue, in absence of

contemporaneous material. The detention therefore stands vitiated for want of proper exercise of powers under Sec.9(2) of the PASA Act and resultant infringement of a constitutional right of the detenu of making an effective representation due to non-disclosure of names of the witnesses. The order of detention, therefore, deserves to be quashed and set aside by allowing this petition.

... ...'

Since the said exercise of finding out the antecedents of the petitioner has not been done in the instant case, the privilege claimed under Section 9(2) of the Act can be said to have been vitiated.

The learned Advocate for the petitioner submitted that the only material which remains is the two registered criminal cases and that by itself cannot be said to be a material for the purpose of holding that the appellant's activities had become a threat to the public order and public health. Necessary material in this regard is totally wanting in the body of the detention order itself. He further submitted that, in large number of cases, the Apex Court has considered that involvement in bootlegging activities, even if coupled with violence, does not amount to threat to public order or public health. To substantiate this point, the learned Advocate for the petitioner has relied upon the decision of a Division Bench of this Court rendered in L.P.A. No.223 of 2000, wherein this Court has held as under in paragraph 5 :-

"5. If we examine the present case on the anvil of the test which has been applied by the Supreme Court in the case of K.S.Zala v. State of Gujarat (Supra), i.e. with regard to the presence of credible material and as to how the detaining authority has made the mention against the appellant being an obstruction to the public health and public order, we find that in the instant case so far as the statements of the witnesses which were recorded with regard to unregistered cases, that ground has been rejected by the learned Single Judge himself. It is, of course, true that

after narrating the particulars of the criminal cases, the detaining authority has mentioned that the activities of the appellant were an obstacle to the public health and public order, but this bald observation cannot be taken to be decisive so as to arrive at the satisfaction that the activities of the petitioner were prejudicial to the public order or public health and that tempo of public life was disturbed. No observation made in any part of the judgement can be read in isolation and bereft the context. The judgement is to be read as a whole and even the observations which have been made by the Supreme Court in para 6 of the judgement are to be considered in light of the earlier observations made in para 5 where presence of credible material before the detaining authority has been insisted upon. Thus, litmus test to find out as to whether it is a case of breach of public order or breach of public health is concerned, credible material has to be there. In the case of K.S.Zala before the Supreme Court, the detaining authority had also relied upon the statements of the witnesses so as to show that violence resorted to by the petitioner in that case had disturbed the even tempo of public life and the material on record had shown that members of the public of those localities had to run away from there and to go inside their houses and to close their doors. No such fact situation has been mentioned in the present case and the ground with regard to the statements of the three witnesses has been rejected by the learned Single Judge himself and it has been held that there had been violation or infringement of the petitioner's right against such statements. In this view of the matter whatsoever said by the three witnesses with regard to unregistered cases and with regard to the three incidents referred to hereinabove, it cannot be considered to be the material germane for the purpose of consideration of the threat to the public health and

public order. Thus, the only material which remains is the registered criminal cases and that by itself cannot be said to be a material for the purpose of holding that the appellant's activities had become a threat to the public order and public health. Necessary material in this regard is totally wanting in the body of the detention order itself. In large number of cases, the Supreme Court has considered that involvement in bootlegging activities even if coupled with violence does not amount to threat to public order or public health. The mere mention of allegations unless they are supported by any material cannot be said to be material germane for the purpose of arriving at the satisfaction with regard to breach of public order or public health and we find that after giving particulars of criminal cases, the detaining authority by including certain allegations, not supported by any credible material has simply observed that the appellant's activities were an obstacle to the public health and public order. In this view of the matter keeping in view the observations made by the Supreme Court in the case of K.S.Zala v. State of Gujarat (supra) itself in paras 4 and 5, we do not find that it can be held to be a case of breach of public health and public order. Learned counsel for the appellant has also argued several other points before us, but we do not find it necessary to go into those grounds. It may be mentioned that it was not a case of breach of public order or public health and it was not argued before the learned Single Judge. Even if that be so, in such matters, the point which arises on the face of the facts of the case by the body of the order itself, which does not require further investigation of the facts, can certainly be allowed to be raised and we allow learned counsel for the appellant to raise this point and find that this point is not without substance. The impugned order passed by the learned single Judge upholding the detention order therefore,

> cannot be said to be in consonance with the settled position of law. The detention order deserves to be quashed and set aside on this ground alone. We, therefore, do not go into other grounds which were raised on behalf of the appellants."

It is not in dispute that both the said cases are in connection with dealing with foreign liquor under the Bombay Prohibition Act and as per the above judgment of the Division Bench of this Court, it cannot be said that, by indulging in such activities, the petitioner has violated public order. On the aforesaid ground, the petition is required to be allowed as it cannot be said that the petitioner has violated public order.

The petition is accordingly allowed. The order of detention is quashed and set aside. It is ordered that the detenu be released forthwith unless he is required in connection with any other case. The Rule is made absolute accordingly.

(P.B. Majmudar, J.)

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(apj)